No. 117

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,* v. THE CALL PUBLISHING COMPANY, *Defendant in Error.*	IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

ARGUMENT AND BRIEF OF DEFENDANT IN ERROR

JOHN M. STEWART,
Solicitor for Defendant in Error.

STATEMENT.

This action was commenced in the District Court of Lancaster County, Nebraska, by the Call Publishing Company, Defendant in Error against the Western Union Telegraph Company, Plaintiff in Error.

The Call Publishing Company was formerly publisher of a daily newspaper, and the basis of its action was a claim

for damages sustained on account of alleged wrongful discrimination against it by plaintiff in error in the matter of charges for telegraphic services.

The petition in substance alleges that the plaintiff in error charged and collected from defendant in error several times as much for telegraphic services as it at the same time charged and collected for like services from the Daily State Journal, a competitor of defendant in error. Plaintiff in error by its answer denied that it had wrongfully discriminated against defendant in error, and alleged the business in question to be inter state commerce, and that plaintiff in error was a government aided telegraph company; that it had filed its acceptance with the Post Master General of the provision of the act of Congress entitled:

"An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes. Approved July 24th, 1866."

It further alleged:

"And that the control of such commerce, and the transmission of such messages is by the constitution and laws of the United States, vested in the Congress of the United States, and that the state of Nebraska, its courts and legislature is and are without authority, power or jurisdiction to regulate or attempt to regulate the same, and that this court is without jurisdiction to weigh, try or determine the matter herein involved."

The trial resulted in a judgment February 13th, 1896, in favor of the defendant in error for the sum of $1,097.66. Motion for a new trial was over-ruled, and the case was taken on error to the Supreme Court of Nebraska by the telegraph company, and on March 8th, 1899, the judgment was affirmed by the Supreme Court, and from such judgment and affirmance the telegraph company now prosecute

POOR COPY

this proceedings in error. No demurrer to the petition was interposed in the District Court, raising either the question of the sufficiency of the allegations of the petition to state a cause of action, or the jurisdiction of the court over the subject matter of the action. Nor does it appear that such court was called on to pass upon such questions in any other way. The petition in error filed in the Supreme Court of Nebraska, contains no assignment relating to the sufficiency of the petition to state a cause of action nor of the want of the jurisdiction of the corut over the subject matter of the action. While it is true the seventh paragraph of the answer pleads want of jurisdiction of the court over the subject matter of the action, it does not appear that the District Court was required by plaintiff in error to rule on this question.

The first assignment of error in the petition filed in the Supreme Court alleges that the Court erred in over-ruling the demurrer ore tenis interposed by the defendant on the trial immediately preceding the introduction of evidence, the ground of said demurrer being that the petition of the plaintiff failed to state a cause of action, but no such demurrer is shown by the record to have been made.

Under the practice obtaining in the Supreme Court of Nebraska, the question of the sufficiency of the petition to state a cause of action may be raised at any time, and in the case at bar this question was raised only, as appears from the record, in the argument of counsel. On this subject. the Supreme Court says in its opinion:

"It is argued that the petition does not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for inter-state business; that the regulation of such business rests ex-

clusively with Congress; that the statutes of Nebraska by which it is sought to establish rules on the subject, were ineffective; that there is no national law applicable, and no rules of the common law in force, or recognized as national rules, are enforcible within the nation, as an entirety, or within the states composing it, or any one thereof, which in the absence of statutory enactment by congress, might be invoked and be governable."

BRIEF AND ARGUMENT.

I

THE BENEFIT AND IMMUNITY WAS NOT SPECIALLY SET UP AND CLAIMED IN THE STATE SUPREME COURT.

It is alleged in the assignment of error herein that the benefit and immunity now contended for was by plaintiff in error "specially set up and claimed," in the State Supreme Court.

To give this court jurisdiction, by the provision of Section 709 of the Revised Statutes, such an allegation was required. It will be seen that there is no assignment of error in the State Supreme Court specially setting up and claiming any benefit, right, or immunity, under the constitution and law of the United States. The first two assignments of error in the proceedings at bar relate solely to the jurisdiction of the state court over the subject matter of the action, and are based upon the claim that the provisions of the Federal Constitution vesting in congress, the regulation of inter-state commerce, was exclusive of the jurisdiction of the state court.

The third assignment of error is based upon the claim that the state court was without jurisdiction because plaintiff in error was a government agency. No such claims are

anywhere shown to have been made in the state Supreme Court. The only intimation in the record that the laws of the Federal government were even incidentally under consideration in the state supreme court is found in the quotation heretofore made in which the court says: "It is argued that the petition in error does not state a cause of action."

The reason for such argument as shown in the opinion is not that the state court has no jurisdiction over the subject matter of the action as alleged in the answer in the trial court, and in the assignments of error in this court, but that under the facts stated in the petition *there is no rule of law authorizing a recovery in any court, state or federal.*

Briefly stated, the argument of counsel made in the state Supreme Court as to the sufficiency of the petition to state a cause of action is based on two grounds:

1st. The judicial determination of controversies growing out of inter-state commerce cannot be grounded on the principles of the common law.

2nd. Congress has enacted no statute creating a right of action against carriers engaged in inter-state commerce for wrongful discrimination, hence no right of action exists.

In the first place, we urge that even though the claim of immunity be sufficiently explicit, it is not enough to simply set up and make such claim in the argument in the state supreme court. It must appear as part of the record. This court has repeatedly so held.

Gross v. United States Mortgage Co., 108 U. S., 477.
United States v. Taylor, 147 U. S., 695.
Duncan v. Missouri, 152 U. S., 375.
Powell v. Brunswick County, 150 U. S., 433.

Nor is it sufficient to claim that the petition does not state a cause of action.

To meet the requirements of the provisions of Section 709, Revised Statutes, plaintiff in error must have set up and claimed in the state Supreme Court in apt terms, the facts that it was entitled to immunity from suit and judgment in the case at bar because it is a government agency, and also that it is entitled to such immunity under the provisions of the Federal Constitution vesting in congress the exclusive control of inter-state commerce. It failed to do this, and by reason of such failure, we submit that this court is without jurisdiction to review such judgment.

In support of such contention, we cite the following citations and authorities:

In the case of Oxley Stove Co. v. Butler County, 166 U. S., 648, the Court says:

"The words 'specially set up or claimed, in the section imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'especially' that is unmistakably this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

In Maxwell v. Newbold, 18 Howard, 516, it is held that the question whether a writ of error will lie from this court to the Supreme Court of a state, depends on the questions raised and decided in the Supreme Court of the state.

In the last named case it was alleged in the state Supreme Court that the charge of the trial court was against and in conflict with the constitution of the United States.

Chief Justice Taney, in the opinion speaking of this allegation, says:

"It alleges that the charge of the court was against and in conflict with the constitution and laws of the United States. But what right did he claim under the constitution of the United States, which was denied him by the state court. Under what clause of the constitution did he make his claim, and what right did he claim under an act of Congress, and under what act of the wide range of our statutes, did he claim it? The record does not show."

See also to the same effect:

Lawler v. Walker, 14 Howard, 149.

Sayward v. Denney, 158 U. S., 180.

Miller v. Texas, 153 U. S., 535.

Morrison v. Watson, 154 U. S., 111.

Chicago, Etc. Ry. Co. v. Chicago, 164 U. S., 454.

Capital National Bank v. Cadiz Bank, 172 U. S., 425.

Waterpower Co. v. Street Ry. Co , 172 U. S., 488.

II.

THE STATE COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

We contend that the state court had jurisdiction over the subject matter of the action. It could apply the principles of the common law in granting a remedy for the wrongful discrimination complained of.

The Revised Statutes of the United States, Section 711 provides in what cases the jurisdiction of Federal Courts shall be exclusive. Cases relating to or growing out of contracts for inter-state commerce are not wthin such pro-

visions. It is true that *legislative control* of commerce between the states is vested in congess, but it does not thereby follow that state courts may not hear and determine controversies between their citizens growing out of such business and involving constitutional and federal laws governing the same.

In the case of Plaquemines Fruit Co. v. Hamilton, 170 U. S., 515, the following statement by Alexander Hamilton is quoted by the court with approval:

"The judicial power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litiagtion between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this, we consider the state governments, and the national government as they truly are in the right of kindred systems and as part of one whole, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in cases arising under the laws of the Union where it was not expressly prohibited."

Such doctrine has been adopted by this court in numerous cases. See

The Moses Taylor v. Hammons, 4 Wall, 429.

Martin v. Hunter, Lesee, 1 Wheat, 334.

In the case of the Plaquemines Fruit Co. v. Hamilton supra, the following language of Chancellor Kent is quoted with approval:

"The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper in every case in which the subject matter may constitutionally be made cog-

nizable in the Federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction over the subject matter."

Upon this point, Judge Shiras in Murray v. R. R. Co., 62 Fed., 42, says:

"A further point is made in support of the demurrer to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of inter-state commerce, the argument being that, as the state cannot legislate touching inter-state commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several states do not necessarily apply to the judicial branches of the national and state governments. The legislature of a state cannot abrogate or modify any of the provisions of the federal constitution nor of the acts of congress touching matters within congressional control, but the courts of the state in the absence of a prohibitory provision in the federal constitution or acts of congress had full jurisdiction over cases arising under the constitution and laws of the United States. The Courts of the states are constantly called upon to hear and decide cases arising under the federal constitution just as the courts of the United States are called upon to hear and decide cases arising under the laws of the states, when the adverse parties are citizens of different states. The duty of the courts is to expain, apply and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a state cannot abrogate or change it, but the courts of a state may apply and enforce it; and hence the fact that a given subject like inter-state commerce is beyond state legislative control, does not, ipso facto, prevent the courts of a state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court, in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete."

In Claflin v. Houseman. 93 U. S., 130, the court says:

"The statutes of the United States are as much the law of the land in any state, as are those of the state, and although exclusive jurisdiction for their enforcement may be given the federal courts, yet where it is not given either expressly or by necessary implication, the state courts having competent jurisdiction may be resorted to."

III.

MAY A COURT LOOK TO THE RULES OF THE COMMON LAW FOR GUIDANCE IN DETERMINING CONTROVERSIES BETWEEN LITIGANTS RELATING TO, AND ARISING OUT OF INTER-STATE COMMERCE?

The real contention urged by plaintiff in error however is not merely that a state court as such, is without jurisdiction, but that all courts, Federal or State, are without authority to grant relief in case of wrongful discrimination, if it involves inter-state business, that is to say, it contends that there is no law affording relief in such cases.

This was the contention of plaintiff in error in its argument against the sufficiency of the petition in the state Supreme Court. It was then claimed, as we have seen, that Congress had not by express statute, given a right of action, and that the common law as to such transactions, did not exist, and its principles could not be looked to for the purpose of granting relief to the injured party.

This subject was exhaustively examined in the case of Murray v. the N. W. Ry. Co., 62 Fed., 24.

In his opinion Judge Shiras cites authorities at great length in support of the position that the rules of common law are applicable to transactions relating to inter-state

commerce and he distinctly held in that case that an action to recover damages for wrongful discrimination by a common carrier in inter-state shipments could be maintained.

In this connection among other things Judge Shiras, in Murray v. R. R. Co., supra, says:

"What more disasterous restraint upon the true fredom of foreign and inter-state commerce could be devised than the adoption of the doctrine that the inaction of congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another., or to transport the products of one locality and refuse to transport those of another; to charge an enormous toll upon the property of one, and carry that of his neighbor for nothing? Can it be possible that the trans-continental railways and other federal corporations engaged in foreign and inter-state commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them with regard to matters under the exclusive control of the national government except the principles of the common law, or the law maritime? I cannot yield assent to the broad proposition that as to those subjects over which congress is given exclusive legislative control, there is no law in existence if congress has not expressly legislated in regard thereto. The true doctrine, in my judgment is that the constitution of the United States, when it was adopted gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law and equity."

This case was taken to the Court of Apeals, and the question involved was discussed at length in the opinion of Judge Caldwell, 92 Fed., 868. In delivering the opinion of the court he says:

"For more than a century, the Federal Courts in the absence of a statute or other obligatory rule of decision have had recourse to the common law for rules of decisions

in the trials of cases in these courts, and have in cases where that law furnished an appropriate rule of decision, rested their judgment on it.

"It has always been assumed that the Federal Courts were endowed with power and jurisdiction adequate to the decision of every cause, and every question in a cause presented for their consideration, and to apply to their solution and decision, every rule of the common law, admiralty law, equitable law, or civil law applicable to the case that would aid them in reaching a just result, which is the end for which courts were created.

"It is implied in the very act of their creation that Federal courts would appeal to the common law as their guide in cases where it was applicable. A decision rested on that law no more raised a constitutional question than a decision based on the law merchant, the admiralty law, equitable law or any authority of fundamental principle of right and justice in a case of first impression.

"We are all of the opinion that a constitutional question is not presented every time a court has occasion to apply the well settled rules of common law regluating and defining the rights, duties, and obligations of common carriers, whether the carriage in inter-state, or intra-state."

In the case of Inter-state Commerce Commission v. Ry. Co., 145 U. S., 263, Justice Brown, delivering the opinion of the court says:

"Prior to the enactment of the act of Feb. 4, 1887, to regulate commerce, commonly known as the Inter-State Commerce Act, railroad traffic in this country was regulated by principles of common law applicable to common carriers."

In Railway Co. v. Osborne, 52 Fed., 912, Judge Brewer speaking for the Court said of the inter-state commerce act:

"It was the first effort of the general government to regulate the great transportation business of the country.

That business, though of a quasi public nature, and therefore subject to a governmental regulation, has as a matter of fact been carried on by private capital through corporations. The fact that it was a public business has always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit, for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

The distinguished law writer, Melville M. Bigelow, in a note in the 5th Ed. of Story on the Constitution, page 112, says, in speaking of this question:

"It would be a most extraordinary state of things that the common law should be the basis of jurisprudence of the states originally composing the Union, and yet the government engrafted in the existing union should have no jurisdiction at all."

In the case of Chicago, Milwaukee, etc. Ry. v. Solan, 169 U. S., page 136., Justice Gray, in delivering the opinion of the court, says:

"The question of the right of a railroad corporation to contract for an exemption from liability for its own negligence, is indeed like other questions affecting its liability as a common carrier of goods or passengers one of those questions not of mere local law, but of commercial law, or general jurisprudence in which this court in the absence of express statute regulating the subject will exercise its own judgment uncontrolled by the decisions of the courts of the state, in which the cause of action arises. But the law to be applied is no less the law of the state; and may be changed by its legislature except so far as restrained by the constitution of the state, or by the constitution or laws of the United States."

See also on this subject 6th Am. & Eng. Ency. of Law, 2nd Ed., pages 285—286.

In the case of the Western Union Telegraph Co. v. James, 162 U. S., 650, it was held that a statute of the state of

Georgia, requiring telegraph companies to deliver messages with impartiality and good faith, and with due diligence, was valid as to inter-state business.

Referring to this statute, the Supreme Court says:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The directon that the delivery of the message shall be made with impartiality and in good faith and with due dilligence, is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction to inter-state commerce within the meaning of that clause of the federal constitution under discussion? We think not."

IV.

Authorities May Be Found in Express Enactment of Congress in Support of the Judgment of the State Court.

While the decision of the state Supreme Court in the case at bar was rested on the common law, it appears that there was in fact, an express act of Congress giving a right of action for damages against the telegraph company for wrongful discrimination.

It has been seen that the plaintiff in error in this case alleges in its anwer that it is a government aided telegraph company, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Post Master General of the United State of the restrictions and obligation of the

act of Congress entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for post, military and other purposes." Which act was approved July 24th, 1866.

In Chapter 772, Vol. 25, Laws of the United States of 1888, it is provided that telegraph companies such as the plaintiff in error herein

"Shall so operate their respective telegraph lines as to afford equal facilities to all without discrimination in favor or against any person or company, or corporation whatever."

Certainly if such telegraphic company would charge one patron three times as much for certan services as it would its competitor for the same services, such act would be in violation of the provision of the law above quoted. This would be a discrimination against one patron and against the other.

Section 5 of the same act provides that the party injured by reason of the telegraph company's refusal to give equal facilities, may maintain an action for damages in the United States Courts. The fact that a right of action is given in a Federal Court does not raise the presumption that the jurisdiction of all other courts over such subject is excluded.

In discussing this question in the case of Plaquemines Fruit Co. 170 U. S., 515, this court quotes with approval from Chief Justice Taney, as follows:

"The true rule of this case is, I think, the rule which is constantly applied to the ordinary acts of legisation, in which

the grant of jurisdiction over certain subject matter to one court, does not of itself imply that the grant is to be exclusive."

Referring to the opinion of Chief Justice Taney, in the above case, the court further says:

"This case it is true, does not present any question as to the jurisdiction of the state courts, but it affirms the rule that a grant of original jurisdiction to a particular court in enumerated cases, does not of itself import that the jurisdiction of that court is exclusive in such cases'

In Silver v.. State of Missouri, 101 Mo., 79, it

"When the act of Congress under which a draw bridge was built, provides that when any litigaion arises from any obstruction or alleged obstruction to the free navigation of the river, the case may be tried in the District Court of the United States in which any portion of said bridge or obstruction touches; such provision does not divest the state court of jurisdiction in such cases."

The following decisions hold the same doctrine:

Mo. River Packet Co. v. Ry. Co., 79 Mo. 478.

Ordway v. Bank, 47 Md., 217.

Raisler v. Oliver, 97 Ala., 710.

The statutes of Nebraska contain similar provisions against wrongful discriminations, and giving to the party injured action for damages sustained. Section 8, Chapter 89 A provides as follows:

"Sec. 8. It shall be unlawful for any telegraph company, association or organization engaged in the business of forwarding dispatches by telegraph to demand, collect or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges, or collects from the publisher or proprietor of any other newspaper for a like service, and the violation of the provisions of sections seven and eight of this act by any telegraph company or association shall constitute a misdemeanor, and upon conviction, said telegraph company or association shall be fined for each and every offense in any sum not less than one hundred ($100.00) nor more than one thousand dollars ($1,000.00) with cost of prosecution, and in addition thereto such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination,"

The foregoing statutes relating to telegraph companies and their liability for damages in case they discriminate between patrons, is declaratory of the rule of common law on which the state supreme court based its decision in the case at bar.

In the case of Lowry v. C. B. & Q. Ry. Co., 46 Fed., was an action to recover damages for wrongful discrimination. It was therein contended that the petition was drawn under the common law, and not under the inter-state commerce act which was then in force.

In his opinion, Judge Caldwell in referring to this opinion says:

"It must be conceded that a complaint would be good at common law and it is true that the provision of the inter-state commerce act, prohibiting unjust and unreasonable charges and unjust discrimination, are merely declaratory

of the common law, and the remedies afforded by the act of Congress for such practices, are cumulative, and not exclusive of the remedy existing at common law."

We respectfully submit that the proceedings in error should be dismissed or the judgment of the state court affirmed.

FRANKLIN W. COLLINS,

Solicitor for Defendant in Error.

JOHN M. STEWART,

of Counsel.